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Paxton

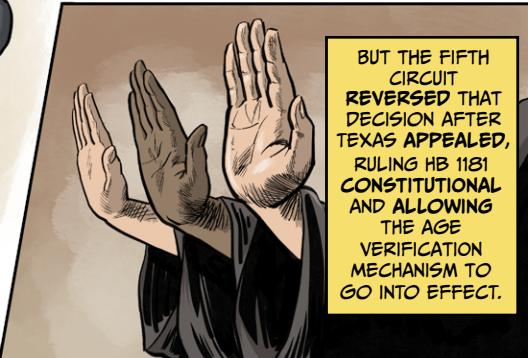
★★★★★ Dan Greenberg

TWO YEARS AGO, TEXAS PASSED HB 1181—  
A STATUTE TO PREVENT CHILDREN FROM  
SEEING PORNOGRAPHY ON THE INTERNET.

HB 1181 REQUIRED DISTRIBUTORS OF "SEXUAL  
MATERIAL HARMFUL TO MINORS" OVER THE  
INTERNET TO VERIFY EACH USER'S AGE, SO AS  
TO LET ADULTS HAVE ACCESS BUT BLOCK KIDS.

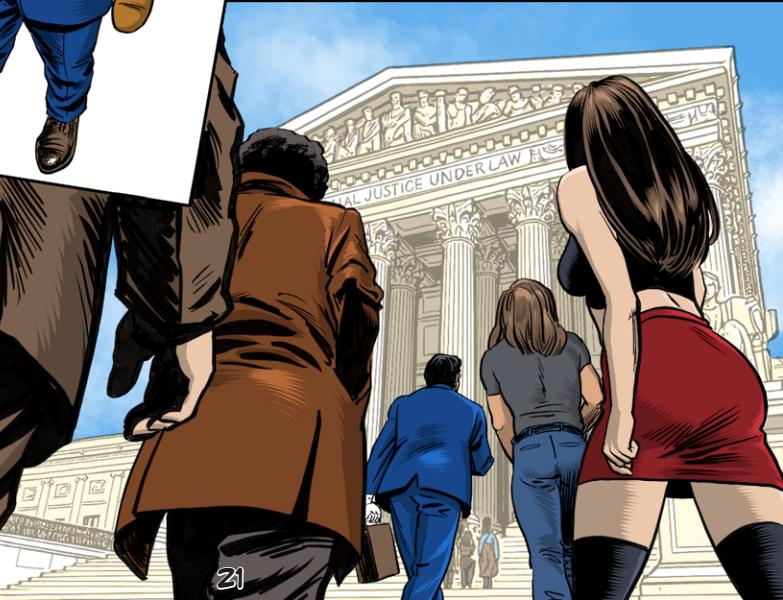
THE FREE SPEECH COALITION, REPRESENTING ONLINE  
PUBLISHERS, SUED TEXAS. THEY ARGUED THAT HB 1181 WAS  
UNCONSTITUTIONAL BECAUSE IT VIOLATED THE FIRST AMENDMENT.

JUST ONE DAY BEFORE HB 1181 WOULD  
HAVE TAKEN EFFECT, A DISTRICT JUDGE  
ANNOUNCED THAT THE LAW WAS  
UNCONSTITUTIONAL AND ORDERED TEXAS  
NOT TO ENFORCE IT.



BUT THE FIFTH  
CIRCUIT  
REVERSED THAT  
DECISION AFTER  
TEXAS APPEALED,  
RULING HB 1181  
CONSTITUTIONAL  
AND ALLOWING  
THE AGE  
VERIFICATION  
MECHANISM TO  
GO INTO EFFECT.

HB 1181'S CHALLENGERS  
THEN APPEALED TO  
THE SUPREME COURT.  
THE NATION'S HIGHEST  
COURT WOULD HAVE TO  
DECIDE WHETHER THE  
STATUTE FURTHERED  
OR FRUSTRATED THE  
FIRST AMENDMENT.



WHY DID THE TWO COURTS DISAGREE ON WHETHER HB 1181 WAS UNCONSTITUTIONAL? BECAUSE THEY USED TWO DIFFERENT LEGAL TESTS TO EVALUATE WHETHER THE LAW VIOLATED THE FIRST AMENDMENT, AND DIFFERENT TESTS YIELD DIFFERENT RESULTS. THE EASIEST TEST TO PASS IS THE RATIONAL BASIS TEST, AND THE HARDEST TEST IS STRICT SCRUTINY.

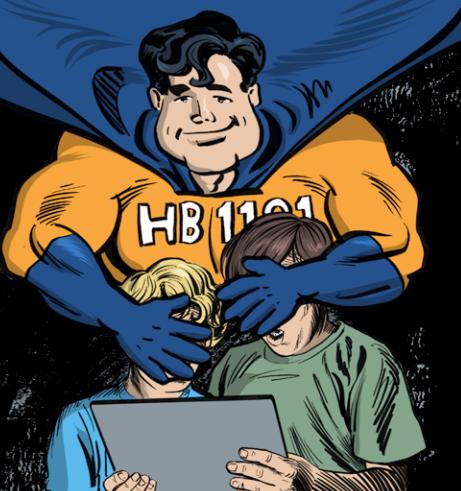
THE COURT OF APPEALS APPLIED RATIONAL BASIS REVIEW, WHICH ASKS: IS THIS LAW RATIONALLY RELATED TO A LEGITIMATE GOVERNMENT INTEREST?

RATIONAL BASIS REVIEW DEPARTMENT



THE APPEALS COURT SAW HB 1181 AS REGULATING MINORS' ACCESS TO PORNOGRAPHY. PRECEDENT SUGGESTS THAT REGULATING CONTENT THAT'S OBSCENE FOR MINORS REQUIRES ONLY MINIMAL SCRUTINY—which led the Court of Appeals to apply the RATIONAL BASIS REVIEW...

...SO IT DETERMINED THAT HB 1181 ONLY REGULATES SPEECH THAT GOES TO MINORS THAT IS OBSCENE FOR MINORS. PROTECTING MINORS IS A LEGITIMATE STATE INTEREST, SO THE STATUTE PASSES THE RATIONAL BASIS TEST. THUS, IT'S GOOD LAW.



THE DISTRICT COURT APPLIED THE STRICT SCRUTINY TEST, WHICH REQUIRES THE GOVERNMENT TO PASS THREE DIFFERENT SUBTESTS—AND IF IT CAN'T PASS ALL THREE OF THEM, IT FAILS.



THE DISTRICT COURT SAW HB 1181 AS RESTRICTING ADULTS' ACCESS TO CERTAIN KINDS OF CONTENT. IT IS ESTABLISHED PRECEDENT THAT REGULATING SPEECH BASED ON ITS CONTENT IMPINGES ON A FUNDAMENTAL CONSTITUTIONAL RIGHT, AND THAT CALLS FOR STRICT SCRUTINY...

...SO IT DECIDED THAT THE STATUTE GOES TOO FAR: IT HAMMERS ADULT ACCESS TO PORNOGRAPHY, AND IT'S MUCH MORE RESTRICTIVE THAN (FOR INSTANCE) REQUIRING FILTERING SOFTWARE. HB 1181 THEREFORE FAILS TO PASS STRICT SCRUTINY, AND IS UNCONSTITUTIONAL AS A RESULT.





ALMOST ANY LAW CAN PASS THE RATIONAL BASIS TEST, BECAUSE ALMOST ANYTHING QUALIFIES AS A LEGITIMATE GOVERNMENT INTEREST.



BUT THE STRICT SCRUTINY TEST IS VERY HARD TO PASS. VERY FEW LAWS EARN THIS JUDICIAL GOLD MEDAL.

WHICH TEST WOULD THE SUPREME COURT CHOOSE FOR HB 1181? AT ORAL ARGUMENT, IT WAS UNCLEAR.

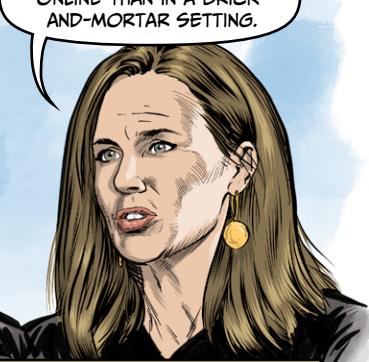
SOME JUSTICES APPEARED UNDECIDED ABOUT WHETHER THE SAME LEVEL OF SCRUTINY SHOULD BE APPLIED TO AGE-CHECKING IN DIFFERENT CONTEXTS.



THE QUESTION IS: WHAT LEVEL OF SCRUTINY, CORRECT?

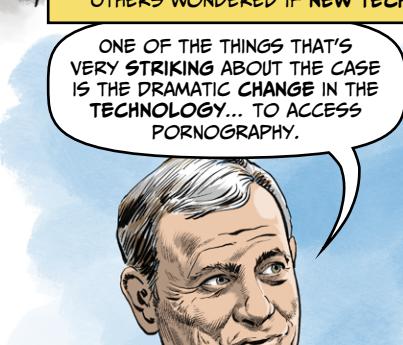


IF THERE'S AN AGE VERIFICATION REQUIREMENT ABOUT PORN MAGAZINES, IS THAT ALSO SUBJECT TO STRICT SCRUTINY?



EXPLAIN TO ME WHY THE BARRIER IS DIFFERENT ONLINE THAN IN A BRICK-AND-MORTAR SETTING.

OTHERS WONDERED IF NEW TECHNOLOGIES IMPLY THAT THE LAW SHOULD APPLY DIFFERENTLY TODAY.



ONE OF THE THINGS THAT'S VERY STRIKING ABOUT THE CASE IS THE DRAMATIC CHANGE IN THE TECHNOLOGY... TO ACCESS PORNOGRAPHY.

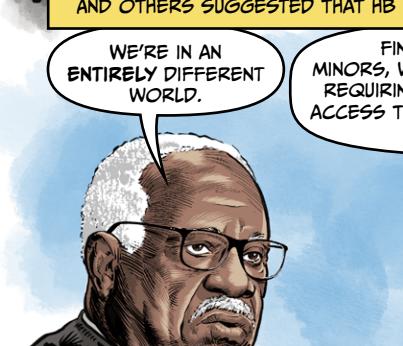


AGE VERIFICATION TECHNOLOGY HAS BECOME CHEAPER AND MORE EFFECTIVE IN PROVIDING CIRCUMVENTION. DO YOU DISPUTE THAT?



COME ON, BE REAL! THERE'S A HUGE VOLUME OF EVIDENCE THAT FILTERING DOESN'T WORK.

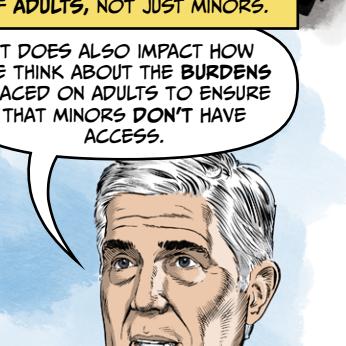
AND OTHERS SUGGESTED THAT HB 1181 MIGHT INTERFERE WITH THE RIGHTS OF ADULTS, NOT JUST MINORS.



WE'RE IN AN ENTIRELY DIFFERENT WORLD.



FINE, WHATEVER YOU DO WITH MINORS, WHAT WE ARE SUGGESTING IS THAT REQUIRING ADULTS TO DO SOMETHING TO ACCESS THIS MATERIAL BURDENED OUR FIRST AMENDMENT RIGHT.



IT DOES ALSO IMPACT HOW WE THINK ABOUT THE BURDENS PLACED ON ADULTS TO ENSURE THAT MINORS DON'T HAVE ACCESS.

BUT THE COURT ULTIMATELY REJECTED BOTH THE RATIONAL BASIS TEST AND THE STRICT SCRUTINY TEST.

INSTEAD, THE COURT DECIDED THAT THE INTERMEDIATE SCRUTINY TEST WAS APPROPRIATE.



THE COURT'S OPINION, WRITTEN BY JUSTICE CLARENCE THOMAS, DESCRIBED TWO PRINCIPLES THAT GUIDE OBSCENITY LAW.

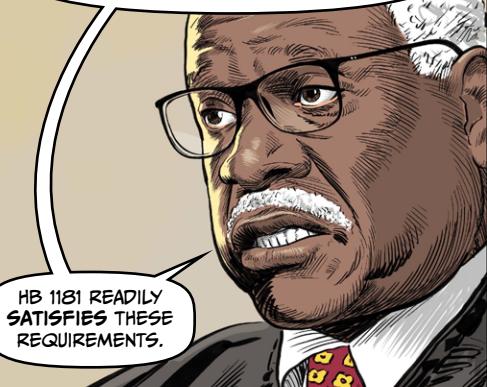
A STATE MAY NOT PROHIBIT ADULTS FROM ACCESSING CONTENT THAT IS OBSCENE ONLY TO MINORS, BUT IT MAY ENACT LAWS TO PREVENT MINORS FROM ACCESSING SUCH CONTENT.



IT REASONED THAT—BECAUSE HB 1181 REGULATES "DISTRIBUTION TO MINORS OF MATERIAL OBSCENE FOR MINORS"—INTERMEDIATE SCRUTINY IS APPROPRIATE BECAUSE THE LAW'S EFFECTS ON ADULTS ARE MERELY "INCIDENTAL."

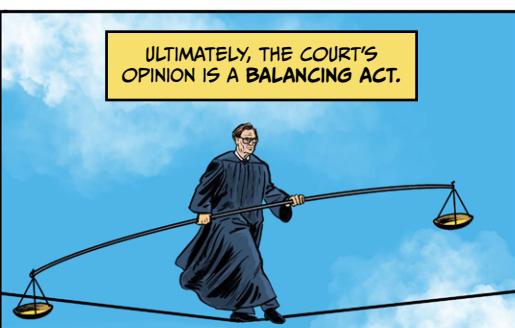
THE COURT DECIDED THAT HB 1181'S BURDEN ON ADULTS ARE INCIDENTAL BECAUSE THERE IS NO FIRST AMENDMENT RIGHT TO AVOID AGE VERIFICATION.

A STATUTE **SURVIVES** INTERMEDIATE SCRUTINY IF IT ADVANCES IMPORTANT GOVERNMENTAL INTERESTS UNRELATED TO THE SUPPRESSION OF FREE SPEECH AND DOES NOT BURDEN SUBSTANTIALLY MORE SPEECH THAN NECESSARY TO FURTHER THOSE INTERESTS.



THE COURT EXPLAINED THAT A MEASURE FOCUSING ON PARTICULAR "IDEAS OR VIEWPOINTS" WOULD DESERVE A HIGHER LEVEL OF SCRUTINY.

ULTIMATELY, THE COURT'S OPINION IS A BALANCING ACT.



THIS DECISION MAKES IT EASIER FOR PARENTS TO KEEP KIDS AWAY FROM PORN, BUT IT ALSO MAKES IT EASIER FOR GOVERNMENT TO KEEP ADULTS AWAY FROM PORN—BECAUSE ADULTS WON'T WANT TO GIVE INFORMATION TO POTENTIAL LEAKERS OR BLACKMAILERS.

MAKING THE INTERNET SAFE FOR KIDS REMAINS AN UPHILL BATTLE.

